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Supreme Court of the United States

OCTOBER TERM, 1904.

No. 58.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY

vs.

H. C. THOMPSON,
ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Reply Brief for H. C. Thompson, Administrator, in Opposition to the Right of Removal

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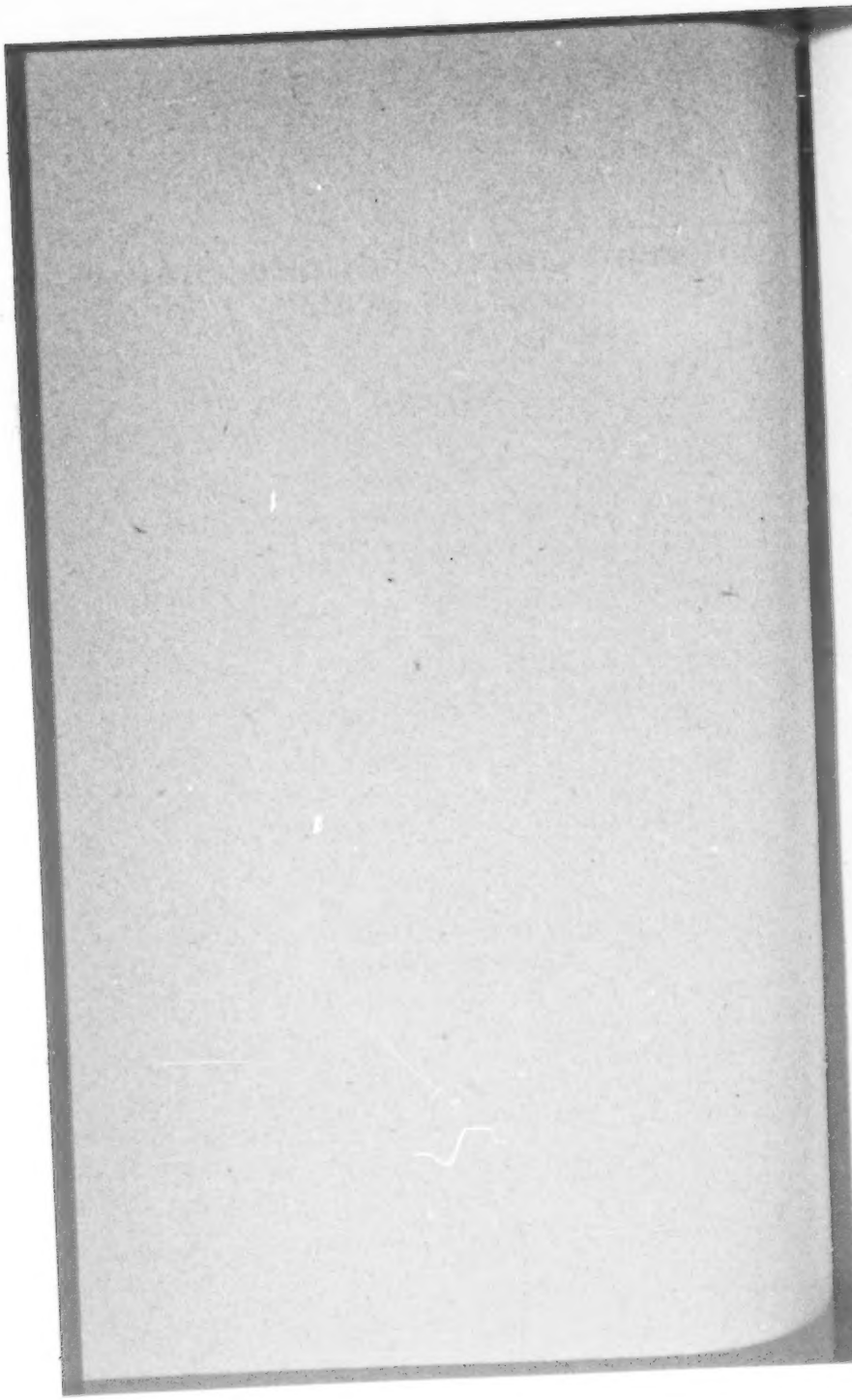

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REPLY BRIEF FOR H. C. THOMPSON, ADMINISTRATOR, IN OPPOSITION TO THE RIGHT OF REMOVAL

STATEMENT OF THE CASE.

This case is in this Court on a certificate of the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, which certificate, after showing that the case was originally brought in a State Court of Tennessee, against the Railroad Company, and two individuals defendants, states that "The case was then removed

without jurisdiction because the Nebraska statute authorized a railroad company to show that the rates therein prescribed were unreasonable and unjust and, if so found, to obtain an order to raise the rates, &c, and that the existence of this adequate remedy deprived the Federal Chancellor of jurisdiction, but said :

> "We can not accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of the Federal Court is not to be conclusively determined by the statutes of the particular State in which suit may be brought, etc." *p. 516.*

We submit that the right of removal is as immune from regulation by State statute as is the right of resort to Federal equity jurisdiction.

In *Brow v. Wabash, 164 U. S. 271, 41 L. Ed. 431,* this court holding that a petition for removal did not waive irregularity in the service of process in an action for personal injury against a railroad company, quoted from *Goldey v. Morning News* that,

> "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and can not be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional Act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. * * *

"Although the suit must be acutally pending in the State Court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the State Court, or that the defendant could have been compelled to answer therein," etc., etc. *p.p. 276, 277.*

We contend that to hold that the question of separable controversy must be determined by the criterion of State practice is inconsistent with the spirit of the decisions just invoked and makes Federal jurisdiction the creature of State legislation, existing or not existing accordingly as the Legislature may mould the State practice with a view of preventing removal from the State Court.

There is a single instance found in the Removal Act wherein State practice is controlling, *to wit*, the enactment as to the time when the petition for removal must be filed, *viz.*, when the defendant is required by the *State law and rules of the State Court* to answer the complaint. In this instance the State may absolutely control the time when the petition for removal must be filed, but may do so not by virtue of State power but by permission of Congress expressly conferred in the Act itself. This is the only instance in which any power or authority to affect in any manner the right of removal is conferred by the statute upon any State tribunal, and the grant of the right in this instance excludes the idea that it is granted in any other particular.

The enunciation especially relied on by our opponents is :

> "*Plymouth Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. Ed. 232, 6 Sup. Ct. Rep. 1034*, and *Connell v. Utica, U. & E. R. Co. 13 Fed. Rep. 241*, are more in point on the precise question sought to be raised, and in the latter case Mr. Justice Blatchford expressed the opinion that it was proper for the Federal Courts to follow the decisions of the State Courts that a cause of action was entire.
>
> Our conclusion is that it can not properly be held that it appeared on the face of this pleading, as matter of law, that the cause of action was not entire, or that a separable controversy was presented." *Ches. & O. Ry. Co. v. Dixon, 179 U. S.* 140.

It is noteworthy that this court did not there say that it was proper for the Federal Courts to follow the decisions of the State Courts that a cause of action was entire, but that Mr. Justice Blatchford had expressed that opinion in *Connell v. Utica, etc., Co.*

The decision of Mr. Justice Blatchford is not so reported as to advise us what the nature of his case was. His language in question was:

> "The decision of the State Court, at the special and general terms, that the cause of action is entire, is a decision which it is proper for this court to follow, and it leads to the conclusion that there is but a single contro-

versy in the suit, and that parties to the suit who are citizens of the same State with the plaintiff, are necessary parties to the controversy to which the plaintiff and the defendant King are parties."

In *Plymouth, etc., Co. v. Amador, etc., Co.*, the *Amador, etc., Canal Co.* sued the Plymouth, etc., Co., Alonzo Hayward, E. L. Montgomery and W. S. Hobart, the first a citizen of New York, the others of California, to enjoin them from polluting the waters running into the canal of the Amador Company, and for $25,000 damages. Upon the face of the petition it did not appear that all the parties were not jointly liable, nor that they were not acting jointly, nor was it established that there was any fraud in the joinder of all of the defendants; the decision therefore was simply that a defendant could not by answering separately make a separable controversy when it had been sued with others jointly. Whether or not if it had appeared upon the face of the petition, as it did appear in the answer, that two of the other defendants were trustees and one superintendent of the Plymouth Company, the decision would have been the same, does not appear. This court there said:

"Upon the face of the complaint there is in the suit but a single cause of action, and that is the wrongful pollution of the water of the plaintiff's canal by the united

action of all the defendants working together. Such being the case, the controversy was not separable for the purposes of a removal, even though the defendants answered separately, setting up separate defenses. *Pirie v. Tvedt, 115 U. S. 41 (Bk. 29, L. Ed. 331); Sloane v. Anderson, 117 U. S. 278 (Bk. 29, L. Ed. 891).*"

This court concluded:

"Under these circumstances the averments in the petition, that the defendants were wrongfully made to avoid a removal can be of no avail in the Circuit Court upon a motion to remand, until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case."

The result, therefore, of the decision in *Plymouth, etc., Co. v. Amador, etc., Co.*, is that the cause of action appeared on the face of the bill to be against the defendants jointly, and that the face of the bill must control the question of joinder unless the defendant both avers and proves the fraud in the joinder. That if there be no fraud the case made by the complainant must control, and not that made by the defendant.

We have, therefore, left with which to deal, only the words of Mr. Justice Blatchford in a very meagre opinion, that a State Court decision "that the cause of action is entire, is a decision which it is proper for this (Federal) court to follow." How far reaching Justice Blatchford

would have permitted his enunciation we can not know. What argument before him there was of the point enunciated we do not know. If he be in error, presumptively this court would have pointed it out to him, had his opinion been expressed in conference here instead of upon the circuit. We submit, however, that Justice Blatchford's enunciation can not prevail. That the States can not be permitted to control Federal jurisdiction, and that the Removal Act has not made the State practice the criterion of "separable controversy" as meant in the Federal statute. That according to the decisions of this court in *Smith v. Ames, etc., supra*, even State legislation can not be permitted to control Federal jurisdiction, nor to affect or modify it.

Accordingly, when the Removal Act provides for removal of a separable controversy, it means such controversy as a just construction of that Act of Congress would decide to be separable, *i. e.*, one that could be fully determined between the parties in question, and not such controversies only as the State Courts or State Legislatures might declare separable when, perhaps, so contriving as to prevent removal to the Federal Court.

As aforesaid, this conclusion results from the Act as expounded in the cases above cited where this court held that the arrangement of litigants upon the State docket was not only immaterial, but that the Federal courts might rearrange the parties, regardless of State

practice, so as to present what was understood in the Act of Congress to be the real controversy between the parties to be determined separable or not separable within the meaning of the Removal Act.

Respectfully submitted,

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Of Counsel.

EDWARD COLSTON,
Counsel.

into the court below upon petition of the railroad company alone upon the ground that a separable controversy, involving more than $2,000.00, exclusive of interest and costs, existed between the petitioner and the plaintiff, as to whom diversity of citizenship existed, which could be tried without the presence of either the individual co-defendants of petitioner."

The certificate further shows that the declaration was filed in the State Court before petition was filed for removal, and in referring to the averments of such declaration, says: "That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer."

It will be observed that the word "wrongfully" is contained in this statement, whereas in the quotation made by adversary counsel in their brief, this word is omitted, and which omission was evidently unintentional. But this particular word may be of much aassistance in arriving at a correct conclusion of the questions now presented for determination, and for this reason special attention is called thereto.

The statement of the case by adversary counsel, except in the above particular, is not controverted. On this state of the record, the Judges of the Circuit Court of Appeals, request instruction of this Court for the proper decision of the following questions:

"1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of

its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

"2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000.00, exclusive of interest and costs, and a requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint feasors being identical with that of the plaintiff?"

BRIEF.

I.

Before passing to a review and discussion of the decisions and authorities bearing upon the questions involved in this case, we deem it important to emphasize the following facts:

1. That all forms of actions have been abolished in Tennessee, and that all civil injuries, whether arising out of contract or tort, may be redressed by an action on the facts of the case.

Shannon's Code of Tenn. (1896) provides as follows:

Sec. 4437. "All contracts may be sued on in the same form of action."

Sec. 4438. "All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case. Penal actions may be brought in the same form."

Sec. 4605. "Any pleading possessing the following requisites is sufficient: (1) When it conveys a reasonable certainty of meaning; (2) when, by a fair and natural construction, it shows a substantial cause of action or defense."

Thus it will be seen that when a case originates in a State Court of Tennessee, the Courts, neither State nor Federal, in passing

upon the right to join the master and servant in the same action, are hampered or embarrassed by reason of any technical question of pleading, or the technical distinction under the common law between actions on the case and those of trespass.

And we shall hereafter undertake to show that most, if not all, the State decisions, which hold that the master and servant cannot be joined in the same action under the facts certified in this case, are predicated upon the fact that the technical question of pleading, and the distinction still maintained in such states between actions on the case and those of trespass, will not permit of such joinder, while in Tennessee, no such technical questions can arise.

2. That under the practice, and laws of Tennessee, the Supreme Court of such State recognizes the right to jointly sue the master and servants under like circumstances as those existing in this case, and this being true that the Federal Courts in most, if not all, the cases in which the question of the State law and practice were involved, have unreservedly held that they will follow the practice and adjudications of the State Court on such questions.

In Connell v. Utica, etc., Railroad Co., 13 Fed Rep. 241, Mr. Justice Blatchford, in passing upon this question, said: "The decision of the State Court at the special and general terms that the cause of action is entire is a decision which it is proper for this Court to follow, and it leads to the conclusion that there is but a single controversy in the suit." This case is referred to by Mr. Chief Justice Fuller in the case of Railway Co. v. Dixon, 179 U. S. 131.

In Charman v. Railway Co., 105 Fed. Rep. 449, Judge Baker *held,* that it being settled in Indiana that a master and servant

may be jointly sued for an injury resulting from the servant's negligence, an action brought in a Court of that state cannot be severed for the purpose of removal, and referred to Wright v. Compton, 53 Ind. 337, in which the Supreme Court said: "That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled."

The cases of Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, and Southern Ry. Co. v. Carson, 194 U. S. 136, are to the same effect, and clearly indicate, in our judgment, that the rule is well settled on this subject.

It becomes, therefore, material to inquire what the decisions are in Tennessee on this subject.

In a decision rendered in 1903, the Supreme Court of Tennessee, through Mr. Justice Shields, clearly indicated what the recognized practice is in such State. It is true that in the case referred to the master and servant were not joined in the same suit, but the direct question as to when, and under what circumstances, tort feasors might be joined in the same action was involved in the case. The suit was against two Copper Companies, and it was sought to hold both liable as joint tort feasors in the same action, and the Court took occasion to pass at length upon the whole question as to when the action might be joint, etc.

The case referred to is Swain v. Tennessee Copper Co., 111 Tenn. (3 Cates) 433. On page 436 the Court says:

"The questions which this Court is called upon to determine in these cases are not merely of pleading, but also of liability, or when one tort feasor is liable for damages done by others to the same party, for the test of joint liability is whether each of the

parties is liable for the entire injury done. If they are joint tort feasors, each one is responsible for the damages resulting from the acts of all the wrongdoers, and they may all be sued severally or jointly; but, if they are not joint tort feasors, each is liable only for the injury contributed by him, and can only be sued in a separate action therefor. These are most important questions, often far-reaching in their consequences, and deserve the most careful consideration."

And again on pages 438-439 it is said:

"When a tort is committed by two or more persons jointly, by force directly applied, or in the pursuit of a common purpose or design, or by concert, or in the advancement of a common interest, or as the result and effect of joint concurrent negligence, there is no doubt but that all the tort feasors are jointly and severally liable for all the damages done the injured party, and that these damages may be recovered in joint or several actions, although the wrongful conduct or negligence of some may have contributed less than that of others to the injury done.

"Torts may also be joint on account of the relations of the parties, such as the joint liability of a husband and wife for the wife's torts, that of the master and servant for the latter's torts, and that of the principal and agent, employer and employee, partner and copartner, for the acts of the agent, employee and copartner, when committed within the scope of the agency, employment, or partnership. (Snyder v. Witt, 99 Tenn., 619, 42 S. W., 441; Railroad v. Jones, 100 Tenn., 511, 45 S. W., 681; Electric Railway Co. v. Shelton, 89 Tenn., 425, 14 S. W., 863; 24 Am. St. Rep., 614; 1 Jaggard on Torts, section 67; Cooley on Torts, p. 133.)

"The parties in all these cases are joint tort feasors. The reason for holding them liable for all the damages inflicted by any of them is that they are all present, in person or by representation, and join in the wrongful act, or in some way knowingly aid in doing it, thereby consenting to and approving the entire wrong and injury done. The whole injury is committed by each and all of the trespassers, and it is but just and right that each of them should be held responsible for all the damages inflicted; and, the liability, being several and joint, they may be sued separately or jointly. But this is not the rule where the tort feasors act independently of each other, without community of interest or concert of action, or common design or purpose, or concurrent acts of

negligence, or where the injury is not the result of force directly applied, but the consequential effects of the wrongful conduct or negligence constituting a nuisance."

And previous to the above decision, the same Court, in Jones v. Ducktown Sulphur, Copper & Iron Co., 109 Tenn., 375, 385, 386 (1 Cates), after holding that when a demurrer is filed to a declaration in an action for damages against joint tort feasors, the question of joint liability must be determined by the case stated in the declaration, said:

"But, in so holding, the court does not desire to be understood as passing upon the merits of the legal question made in defendant's brief, viz., whether two tort feasors can be properly sued together, where their several acts complained of are separate and distinct, not done in collusion, by confederation, or as simultaneous acts of negligence or wrongdoing, *or where they do not sustain to each other any contractual relation, as master and servant, principal and agent, or the like* (italics ours), but where their separate and independent acts merely concur in a general result, as where a stream is polluted by two different persons turning sewage into it at different places, independently of each other, or where the air is polluted by the emanations intermingling in the air, and descending together upon the lands of neighboring owners. The question so stated and illustrated was attempted to be made in the brief and in the discussion at the bar by the learned counsel for defendants, but it could not be properly raised on demurrer to the declaration in either of the cases before the court, as these declarations were drawn."

These two cases clearly indicate that the Court meant to draw a distinction between cases of tort feasors generally, and those where it appears that the action is against the master and servant, the right of action being predicated upon the negligence of the servant. These cases hold, in effect, that the identity of master and servant is such that the liability of both can be enforced in the same action.

3. That under the facts alleged in the declaration in this case, plaintiffs' right of action is based not only upon the common law, but a violation of a Statute of Tennessee. At the time of the institution of this suit, the following Statute of Tennessee was in full force and effect:

"In order to prevent accidents upon railroads, the following precautions shall be observed: * * * *

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, and the brakes put down, and every possible means employed to stop the train and prevent an accident."

Shannon's Code, Sec. 1574, Sub-sec. 4.

And with reference to this section, it is further provided by Sections 1575 and 1576 as follows:

"Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

"No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it observed said precautions shall be upon the company."

As shown by the certificate in this case, the declaration charged "that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars, owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills as conductor and Edgar Fuller as engineer." And this allegation is sufficient under the holdings of the Supreme Court of Tennessee to charge a violation of the foregoing statutory provision.

In the declaration in the case of the East Tennessee, Virginia & Georgia Railroad Co. v. Pratt, 85 Tenn. 9, no reference was made to the statute, and it was claimed by the railroad that a violation thereof could not be shown or relied upon in the case, and the Court in passing upon the question said:

"It follows, therefore, that if an injury to a person occurs while he is on the road of the company, through any negligence, of its officers and servants, it is now statutory negligence, or negligence against which the statute, as well as the common law, provides; and a declaration, as in the present case, that the servants of the company wrongfully and negligently run its train over such person, gives notice that it was contrary to the statute, and imposes no hardship on defendant in requiring that it come and defend, by showing, in accordance with the same statute, that it observed these precautions, and is therefore not liable."

As before shown, the declaration in the present case alleges that "the intestate of the plaintiff had been *negligently, wrongfully and carelessly* run over upon the track of the Railroad Company, etc.," and consequently charges a violation of the statute, although no reference whatever is made thereto in the declaration. We are advised the United States Circuit Court of Appeals of the Sixth Circuit has recently held that it will follow the State Supreme Court on the question as to the scope and effect to be given to a declaration involving the above state statute, but we are unable at this time to put our hands on this decision.

The question of the right of the railroad company to run its cars and trains in any other manner except with engine in front with the *"engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead,"* as provided by statute, has frequently been before the Supreme Court of the State, and in discussing this question, Mr. Chief Justice Snodgrass, in Railway Company v. Wilson, 6 Pick., 277, 278, says:

"It may be argued that this is inconvenient; that a railroad company must some time back in trains on its tracks. This may be entirely true, but it proves nothing. The company can do all its running that way if it prefers; the statute does not prohibit it absolutely and at all events. The statute merely makes it liable for any injury inflicted while doing so. If for reasons of convenience or economy the company prefers to take the risk, it may do so; but it cannot complain that it suffers the legal consequences of the risk thus taken. Of course it can reduce the risk to a minimum by keeping some one in front of the train and warning off or actually removing obstructions. If it prevents injury, it prevents loss; but this it must do if it avoids the consequences of disregarding the statute. Nothing else will answer."

And in Railroad v. Dies, 14 Pick. 661, the court, through Mr. Justice Wilkes, says:

"We can add nothing to the force, and certainly cannot make plainer, the principle laid down in the Wilson case, that a railroad company may run its engines, tenders and trains backward if it prefers, or sees proper to do so from convenience, necessity, or other reasons, but it will always follow that the statute will make it liable for any and every injury inflicted while doing so. If any injury occurs, then liability follows inevitably, and the only question to be considered is the amount of the injury and the extent, if any, of the contributory negligence of the injured person."

Our object in calling the Court's attention to this question is twofold: (1) To show that the right of joinder may exist when the injury complained of is the result of the violation of a state statute, although such right of joinder would not exist independently of such statute.

In Charman v. Lake Erie & W. R. Co. et al, 105 Fed Rep. 449, the effect and proper construction of the following Indiana Statute was involved: "That every railroad * * * operating in this state shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the

exercise of due care and diligence, * * * where such injury was causd by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway."

And Judge Baker in deciding the case held that where the negligence of the foreman in charge of a switch yard causes an injury to an employe therein, his act constitutes a breach of duty of the master, and at the same time, a branch of duty on his own part towards his co-employe, and the person injured may maintain a joint action against the master and servant for the injury.

It may be said by counsel for railroad that the Indiana Statute simply creates a liability against the railroad as to an employe while injured in its service, etc., and that it does not cover a case where it is not shown that the relationship of master and servant existed between the railroad and the injured party, as in the case at bar.

Our reply is, that the Tennessee Statute does not limit its force and effect to employes of the railroad, but is broad enough in its scope to cover all persons upon the track of the railroad, whether they be employes, trespassers, or what not, as the Statute says that "in order to prevent accidents upon railroads," the "railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when *any person, animal or other obstruction appears upon the road* (italics ours), certain things shall be done in order to prevent accident. We are aware of the rule that as to trespassers the railroad ordinarily would only be liable for a wilful or wanton injury. But this rule has no application when recovery is sought on account of an injury inflicted because of a failure to comply with the provisions of the foregoing statute.

It is held in Railroad v. Dies, 14 Pick. 661, heretofore cited, as well as in many other Tennessee cases, that if any injury occurs by reason of the failure to comply with the Statute, *"then liability follows inevitably, and the only question to be considered is the amount of the injury and the extent, if any, of the contributory negligence of the injured party."*

(2) That the servants of the railroad company, in charge of the train, at the time of the injuries complained of, were guilty of misfeasance, and that this fact gives the right to sue jointly, although such right might be questioned if such servants were merely guilty of non-feasance. Bouvier's Law Dictionary defines misfeasance to be "The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury." Rapalje & Lawrence's Law Dictionary defines the word as follows: "Misfeasance is either the doing of a wrongful act or the improper performance of a lawful act." And other authorities define it to be "The improper doing of an act which a person might lawfully do."

In this case the railroad company and its servants might lawfully run its trains, but when they undertook to run the same in such manner as to violate a state law, this was the improper doing of an act which might lawfully be done, or was the performance of a lawful act in an improper manner, and consequently such servants are guilty of misfeasance.

Under the allegations in the declaration, it could be shown that the train causing the injury was being operated with engine in the middle or rear of the train, and this would be a positive act of misfeasance on the part of the servants in charge thereof.

II.

While the authorities are in conflict as to the right of joinder under the facts certified in this case, still we believe the authorities, both in numbers and in reasoning, largely preponderate in favor of the right of joinder. Most, if not all, the Federal cases which hold a contrary doctrine, seem to be bottomed on the decision of Judge Taft in Warax v. C., N. O. & T. P. Ry Co., 72 Fed Rep. 637.

The theory of that case is that for the negligent acts of the servants, committed in the absence, and without the concurrence or express direction of the master, the liability of the master arises solely from the policy of the law which requires that he shall be held responsible for the acts of his servants, performed in and about the master's business, while the liability of the servant arises solely from his own personal wrong.

Most of the subsequent Federal cases have assumed, without discussion, or apparent consideration, that the Warax case stated the correct theory upon which the master's liability is based. This position has been assailed as unsound by able authority, as will hereinafter be shown. The liability of the master in most, if not all cases, arises because of the violation of some duty which the master owes to the injured party. Take the present case, for instance: Both under the common law and by statute in Tennessee, as hereinbefore shown, it is made the duty of every railroad company to keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead, and when *any person*, etc., appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop

the train and prevent an accident. (See Sub-sec. 4 of Sec. 1574 and Secs. 1575 and 1576, Shannon's Code of Tennessee.) Here is a duty imposed upon the master as to *"any person"* who may appear upon the road of the master, and if the master employs servants who negligently fail to perform this legal duty, the master is liable because of a disregard or a violation of such duty.

In Charman v. Lake Erie & W. R. Co., 105 Fed. Rep. 449, Judge Baker most admirably states this rule and supports the same with such reasoning as to place its correctness beyond doubt. After quoting the following Indiana Statute: "That every railroad * * * operating in this state shall be liable for damages for personal injuries suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, * * * where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway," Judge Baker said: "In the case of Warax v. Railway Co., supra, it was held that there were separable controversies in a joint suit for tort against master and servant, because the liability of the master for the negligence of the servant in his absence and without his knowledge or approval arises from the principle of public policy which requires that the master shall be held responsible for the acts of his servant done in and about the master's business, while the liability of the servant arises from his personal wrong.

"The foregoing cases seem to rest upon too narrow a view of the relation of master and servant, especially where the master is a corporation, and in failing to place the master's responsibility on its true basis. To affirm that public policy or a rule of law makes the master answerable for the negligence of his servant in and about the master's business is not an accurate and complete state-

ment of the principle on which the master's liability rests. If any action can be maintained against the master in such a case, it is because he owes a duty towards the injured person which has been violated. It is universally agreed that, in order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to be existing some obligation or duty towards the plaintiff which the defendant has disregarded or violated. This is the basis on which the cause of action must rest. There can be no actionable fault or negligence or breach of duty where there is no act or service or contract which the party is bound to perform. The statute of this state above quoted has made it the duty of the railroad company to place a person in charge of its switch yard who should be free from fault resulting in injury to a fellow servant. The master is made an absolute guarantor that the decedent should not be harmed by the negligence of the servant in charge of the switch yard. This duty was a positive and continuing one. The duty of the person in charge of the switch yard, growing out of the exigency of the social order, was so to conduct himself about his master's business as not to injure a fellow servant by his negligence or want of due care. The plaintiff's intestate is alleged to have been killed by the negligence of the person placed by the defendant company in charge of its switch yard. The negligence of the person in charge of the switch yard gave rise to a two-fold breach of duty, namely, that of the person in charge of the switch yard and that of the railroad company. The breach of the master's duty arose from its failure to keep in charge of its switch yard a person who would not by his negligence injure a fellow servant. If the master had not failed in the performance of his duty, no actionable injury could have occurred. The servant's carelessness constituted a breach of duty on the part of the master. While the master's duty was an absolute and continuing one, to keep a person in charge of its switch yard who would not injure a fellow servant by negligence, no breach of this duty could happen, except through the negligence of the person so placed in charge. The mere placing by the master of a careless person in charge of its switch yard would of itself constitute no actionable wrong, and an actionable breach of duty could only arise when a fellow servant was injured by the negligence of such person. It is thus manifest that the company's breach of duty was concurrent in point of time with

the breach of duty of the person in charge of the switch yard, and that the breach of duty on the part of each grows out of the same acts and omissions. The injury complained of arose from a concurring and co-operating breach of duty on the part of each, and it could not have occurred except as the result of such concurring and co-operating breach of duty. If the company had not employed the careless servant, and if the servant had not been careless, the injury would not have happened. The liability of the company does not grow out of the breach of the servant's duty by the servant, on the principle of *respondeat superior*. It grows out of the breach of the company's duty by the company failing to keep a person in charge of its switch yard who would not by his negligence injure a fellow servant. If the employer fails in the performance of this duty, his responsibility does not arise out of the servant's breach of the servant's duty towards the injured party, but it grows out of the employer's breach of the employer's duty towards the decedent—a duty imposed upon the employer by law. The defendants have each violated a duty owing to the decedent, imposed upon them by law. The negligent acts of the servant gave rise to a breach of duty on the part of each. It is not essential that the duty violated by each should be joint or identical, nor that the duty of each should be deduced from the same legal principles. The case of a joint action by a passenger who is injured by the collision of two trains owned and operated by different railroad corporations affords a familiar illustration. The duty of the carrier of the passenger is to exercise the highest practicable degree of care to protect him from hurt. Its liability grows out of the breach of this duty. The duty of the other company is to use ordinary and reasonable care not to collide with the train carrying the passenger. Its liability grows out of the breach of this duty. The two companies may be jointly sued for the injury of the passenger, and the cause of action is not separable and removable by one of the two defendants. Railway Co. v. Martin, 59 Kan. 437, 53 Pac. 461; Id., 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. Hence it is apparent that it is not necessary to the maintenance of a joint action for tort that the injury should grow out of the breach of a joint duty, nor out of the same or similar duties deducible from the same or similar principles of law. The rule would seem to be that where the same acts or omissions constitute and give rise to a breach of duty owing by each defendant to the plaintiff, and concur and co-operate in producing the injury, a joint action may be maintained."

This opinion so fully sustains the right of joinder in this case, that we have thought it imporant to quote extensively from it.

In Riser v. Southern Ry. Co., 116 Fed. Rep. 215, Judge Simonton asserts the same rule as laid down by Judge Baker. Judge Simonton said: "The conductor is the representative of the corporation. His negligence is its negligence. If he is liable, the corporation by reason of his liability is also liable. * * * When the servant of a railway company is guilty of negligence in the course of his employment, his negligence is the negligence of the railway company. It may be one act, but the liability is the liability of both. The one cannot be separated from the other."

These opinions show that the identification of the master and servant is so complete that to hold that a separate controversy existed would end in much confusion, be a source of great injustice, and result in useless litigation to those who may have a just grievance to be redressed against corporations and their servants.

Attention is called to the fact that this Court has, in no adjudicated case that we have been able to find, committed itself to the doctrine of the Warax case in any particular. On the contrary, the intimations are that the right of joinder is to be determined on a different theory altogether. It is claimed by adversary counsel that none of the decisions of this Court are in conflict with the Warax case, and refer especially to Ry. Co. v. Dixon, 179 U. S., 131. It is true that in the Dixon case a Kentucky Statute was involved, but this Court in discussing the case seemed to largely ignore the technical question of Statute, and to place its holding upon the right of joinder independent of Statute. While in that case joint and concurrent negligence was charged, still when the specific acts of negligence alleged are considered, it

must appear that such allegations do not differ materially from the allegations in this case, and the charge that the injury resulted from the joint and concurrent negligence of all the defendants was a mere conclusion of law and not the statement of a fact.

Mr. Chief Justice Fuller in the Dixon case, among other things, said:

"In respect of the removal of actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute. In Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92, it was said:

" 'It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' " * * * *

"The contention of counsel is that this complaint charged neither direct nor concurrent nor concerted action on the part of all the defendants, but counted merely on the negligence of the employes.

"If the complaint should be so construed, the question would still remain whether the cause of action was not entire as the case stood, and the objection of the difference in the character of the liability matter of defense, which might force an election, or defeat the action as to one of the parties.

"The cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse. And on the principle of the identification of the master

with the servant, it would seem that there is no fact which the company could traverse which its codefendants, being its employes, could not. At all events, a judgment against all could not afterwards be attacked for the first time on this ground." * * * *

In Southern Railway Co. v. Carson, 194 U. S. 136, this Court, through Mr. Chief Justice Fuller, again said:

"The right of removal depends on the act of Congress, and the company not only on the face of the pleadings did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray, in Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92, 'that an action or tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses, from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive the plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'

"The view thus expressed was reiterated in Chesapeake & Ohio Railway Company v. Dixon, 179 U. S., 131, where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. (Schumpert v. Southern Railway Company, 65 S. C., 332.) In that case it was held that under the State Code of Civil Procedure, in actions *exdelicto*, acts of negligence and willful tort might be comingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service; that the objection that if the master and servant were made jointly liable for the negligence of the latter,

the master could not call on the servant for contribution, was without merit, as the rule was, as laid down by Mr. Cooley (Torts, page 145), that: 'As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' And see Gardner v. Railway Company, 65 S. C., 34. In Rucker v. Smoke, 37 S. C., 380, and Skipper v. Clifton Manufacturing Co., 58 S. C., 143, it was decided that in actions such as this exemplary damages may be recovered."

We call special attention to two propositions announced in the Dixon and Carson cases, as follows:

1. That "the rule is well established * * * that an action of tort which might have been brought against many persons, or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants."

2.. "That many courts have held that the identification of master and servant to be so complete that the liability of both may be enforced in the same action."

The opinion in the American Bridge Co. v. Hunt, 130 Fed. Rep. 302, the certificate in this case, and the opinion in Davenport v. Southern Ry. Co., 135 Fed Rep., 960 (overruling Davenport v. Southern Ry. Co., 124 Fed. Rep., 983, as hereinafter shown), show very conclusively, that the subordinate Federal Courts do not regard the doctrine of the Warax case as firmly established, or that same is entitled to be followed as an authority.

In the American Bridge Co. v. Hunt, 130 Fed. Rep., 302, Judge Lurton, who sat with Judge Taft in the Warax case, used this language:

"Whether there is such legal identity of master and servant, or concert between them, as to justify a joint action when the act of negligence charged is that of the servant alone, and the liability of the master is bottomed not upon any immediate fault of the master, but upon the liability of the latter for the negligent acts of the servant, may admit of much discussion. (Warax v. C., N. O. & T. P. Ry. Co. (C. C.), 72 Fed. 637; Bryce v. Southern Ry. Co. (C. C.), 122 Fed. 709; Davenport v. Southern Ry. Co. (C. C.), 124 Fed. 983; Helms v. N. P. Ry. Co. (C. C.), 120 Fed. 389; Mulchey v. Society, 125 Mass. 487; Campbell v. Sugar Co., 62 Me. 553,

16 Am. Rep. 503; Lamm, et al v. Parrot Silver & Copper Co. (C. C.), 111 Fed. 241.) It must be confessed, however, that the doctrine of the common law in reference to the joinder of master and servant in one suit based alone upon the tort of the servant as in the Warax case, and other cases cited above, is shaken by contrary intimations found in Powers v. Chesapeake, etc., Ry. Co., 169 U. S. 92, 97, 18 Sup. Ct. 264, 42 L. Ed. 672, and Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S., 131, 137, 21 Sup. Ct. 67, 41 L. Ed. 121. This question, though a nice one and not foreclosed by authoritative decisions, does not necessarily arise upon this transcript as we construe the averments of the plaintiff's petition."

STATE DECISIONS.

There are numerous State decisions to the effect that joint liability exists under the facts of this case.

In Wright v. Compton, 53 Ind., 337, the Court said:

"The general rule is, that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants, while in the performance of the master's business. * * * That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled."

The case of Schumper v. Southern Ry. Co., 65 S. C., 355, is strong in its presentation of the right to jointly sue, and that there is no separable controversy. In that case the Court said:

"Appellants do not dispute the proposition that the master is liable for the negligence of the servant within the scope of his employment, nor do they dispute that the servant is also liable for his own tort. The contention is that there is no joint liability unless the master directs or is present actively co-operating in the commission of the tort. There is undoubtedly some authority for this view as shown by the cases cited in appellant's brief and by reference to the citations found in 15 Enc. P. & P. 560-561, in the note in 28 L. R. A., 441-442. The leading case for such view is Parsons v. Winchell, 5 Cush. 592 (52 Am. Dec., 745),

wherein the Court held that master and servant are not jointly liable for the servant's negligence in the master's business in so driving a team as to cause an injury to another. In the view of that Court the act of the servant is not the act of the master even in legal intendment or effect unless the master previously directs or subsequently adopts it. In either case he is liable for the act of his servant when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. The principal reason assigned for this view is that if master and servant were made jointly liable, the master cannot call on the servant for contribution in case he should satisfy the execution. But as it appears in the Note to the case cited in the 52 Am., Dec. 743, the Mass. Court in Hewitt v. Swift, 3 Allen, 425, held that a joint action in the nature of trespass would be against a corporation and its servant for personal injury inflicted by the latter in discharging duties imposed by the corporation. Parson v. Winchell was an action on the case, and Hewitt v. Swift was in trespass under common law pleadings, which made a distinction between the remedies for injuries with force and injuries without force. All such distinctions are abolished under the code. With reference to the matter of contribution which is suggested as presenting a difficulty in the way of holding master and servant jointly liable, Mr. Cooley in his work on Torts, pages 144-5, after stating the general rule as to contribution, between wrongdoers, says:. 'But there are some exceptions to the general rule which rests upon reasons at least as forcible as those which support the rule itself, they are cases where although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party by reason of some relation is made chargeable with the conduct of others.'

"A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and the servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrong-

doer, and in calling upon him for indemnity the company basis no claim upon its own misdeeds, or default, but upon that of the servant himself.'

"By legal intendment and effect the act of the servant within the scope of his agency is the act of the master. In such case there is a legal identification of the master and servant. In the case of a railroad corporation which owes important duties to the public, or those affected by its operation, and which cannot act except through agents, there is the strongest reason for holding that with respect to acts done in its service by the agent within the scope of their employment, the corporation is present acting through its agents. *Oui facit per alium facit per se.* The servant is liable because of his own misfeasance or wrongful act in breach of his duty to use that which he controls as not to injure another. The master is liable because he acts by his servant, and is therefore bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency.

"Some of the cases in discussing the liability of a servant through a third person make a distinction between non-feasance and misfeasance of the servant, but all agree that the servant is liable for his act of misfeasance. Inasmuch as the acts of the servant in this case were clearly misfeasances, no occasion arises here for noticing the distinction. Among the authorities that may be cited in support of the view that master and servant are jointly liable for the misfeasanec of the servant acting within the scope of his agency, are, Cooley on Torts, 142; Wright v. Wilcox, 19 Wend. 343; Phelps v. Wait, 30 N. Y., 76; Greenburg v. Whitcomb, 90 Wis., 225 (28 L. R. A., 439)."

In Wright v. Wilcox, 19 Wend. 343, it is said:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, the master constructively, by the servant, his agent. Hr. Handam lays down the rule in this way: 'Whether the principal and inferior may be charged jointly, depends on whether the inferior is liable as a trespasser *vi et armis,* or in case only. If the latter, they may be sued together, but otherwise, if the former, it being held, how justly may be questioned, that a principal is

liable for his agent's misconduct only in case.' Ham. part to actions 85. 86. This rule is in the main, doubtless right, but seems to be shaken by Moreton v. Harden, 6 Dowl. and R. 275, in respect to the quality of the servant's act. There were, in that case, three proprietors of a coach, one was driving and ran against the plaintiff's cart. All three were sued in the case; and several judges thought either trespass or case would lie against the driver, though the mischief arose from mere negligence; but all agreed that case only would lie against the other two who were absent; yet the action was maintained against all three."

In the case of Phelps v. Waite, 30 N. Y., 78, the following question, among others, was involved:

"Will a joint action lie against the principal and the agent for the negligence of the latter (in the absence of the former), in the course of his employment?" The Court, in passing upon this question, said:

"The case was retained for examination principally upon the other point—the supposed misjoinder of parties—and to enable the defendant's counsel to supply a reference to authorities showing that in analagous cases principal and agent could not be sued together. The current of authorities is certainly the other way, and in favor of the right to join these parties. And I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine. The question was carefully considered by the Supreme Court in the leading case of Wright v. Wilcox (19 Wend., 343), and has since been followed in several other cases. (Montfort v. Hughes, 3 E. D. Smith's Rep., 591; Suydam v. Moore, 8 Barbour, 358; Hewett v. Swift, 10 Am. Law. Reg. 505).

"The defendant's counsel refer to a manuscript case in the Supreme Court in the Fourth Judicial District, Vernan v. Gibson & Farnham, which is supposed to hold a contrary rule; but we have not been favored with the opinion of the court, and unless it is based upon some other principal than those discussed in the cases already adverted to, it must be regarded as overborne by the weight of authority. The judgment should be affirmed."

In C., N. O. & T. P. Ry. Co. v. Cook, Admr., 67 S. W., 383, the court held that the right to sue jointly existed independently of statute, and in the course of the discussion said:

"In support of this position (that the action could not be maintained) we are referred to several cases outside this state so holding. *But the decided weight of authority is the other way.* See 15. P. & P., 560; 1 Thompson Neg., 611. The conflict in authority on the question seems to be due largely to differences of the common law forms of pleading which no longer exist in this state. Citing from Pomeroy's Remedial Rights, Sec. 307; Bliss Code Pleading, Sec. 83."

In Cook, Admr., v. Winston, 55 L. R. A., 603 (Ky.), the Kentucky Court seems to hold that a joint right of action exists independent of the Statute of that State. The Court said:

"The constitution and statutes of this state, as construed by the repeated adjudications of this court, make the railroad company liable for the acts of the agents and servants in charge of its trains. If a servant is guilty of such negligence while acting for his master, as will make the master responsible, then in such a case the servant is personally and equally responsible with the master for the damage resulting from the negligent act. The mere fact that the master may be responsible for the wrongful act of the servant does not relieve the servant from a joint liability with the master for the wrongful act which produced the injury and damage. The court then refers to the Dixon case."

The Kentucky Statute is as follows:

"Sec. 6, Ky. Statutes. Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

In McHugh v. N. P. R. Vo., 72 Pac., 450, it was held: "In an action by an employe of a railroad for injuries received by being struck by a train while riding on a hand car, it was proper to join with the railroad as a party defendant the engineer of the train."

In Howe v. M. P. E. R. Co., 70 Pac. 100, it is held as follows: "In an action by a fireman for injuries sustained in a collision, it was proper to join with the railroad as a party defendant, the division superintendent and the division train dispatcher."

In the case of Schaefer v. Osterbrink, 67 Wis., 495, suit was brought jointly against the master and his servant to recover for personal injuries inflicted upon the plaintiff on account of the negligent driving of a team of the master by said servant past that of the plaintiff on the highway. On the question of liability the Court said:

"A duty may and often does exist without any contract. Two teams upon a public highway, each with a sleigh or vehicle, coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law, and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment, then such duty rests upon the master as well as the servant. Limpus v. L. G. O. Co., 32 Law J. Exch. (N. S.), 34. The employer in such case, being responsible for the performance of such duty by his delegated agency, can no more escape liability for such failure when it occurs through his agent's gross negligence or wilful misconduct, than he can when it is by reason of his agent's want of ordinary care."

In Newman v. Fowler, 37 N. J. L., 89, Mr. Chief Justice Beasley said:

"The damages for which indemnification is sought in this suit, are the results of the negligence of another party as well as that of the defendant. The plaintiff employed the defendant to oversee in the capacity of architect, the putting up of a building, and the verdict has established that this structure is defective in workmanship and material, in consequence of the want of care or want of skill, of the contractor engaged to do the work, and of the defendant as architect. The loss comprised in the present cause of action has arisen, therefore, by reason of the default of these two persons, the contractor and the defendant. The suit is against the latter solely.

"There can be no doubt that when two or more persons occasion, proximately, an injury, though not acting in concert, they are severally liable for the consequences. In this respect there is no difference between wrongs, the result of force and such as proceed

from ignorance or carelessness. Whenever the damage is the product of contributory misfeasances the action will lie against each of the wrongdoers, and the person thus sued will be held for the entire detriment. It is the familiar rule of practice that all or any of joint trespassers may be prosecuted, and that such as are thus sued must answer for all the consequences of the wrong done. Nor can they claim contribution, the one from the other, so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjust the burdens of misconduct. This principle is a general one, applicable in every case of a tort. There are many adjudications which exemplify this rule in its bearing in regard to actionable neglect. Thus, where an injury is caused by the negligence of an agent, acting in the line of his employment, the action may be joint against such agent and his principal, or may be separate against each. Phelps v. Waite, 30 N. Y., 78; Wright v. Wilcox, 19 Wend. 343. The same ground of decision was acted on recently in this Court, in the case of Bennett v. New Jersey Railroad Company, in which an action was sustained for a damage which had been caused by the negligence of the defendant and that of another party, who was not joined in the suit. It would seem, therefore, that the right of the present plaintiff to elect whether to bring this action against either of the defendants as the architect, or against the contractor, for the damage occasioned by their joint neglect is indisputable. To this extent the case presents no feature which is not common to many of those which have heretofore received judicial sanction."

TEXT WRITERS.

In Sherman & Redfield on Negligence, Vol. 1, Sec. 248 (5th Ed), it is said:

"Wherever the master can be held responsible for tortious negligence of his servant, the two are generally held jointly as well as severally liable; and if a servant employs a sub-agent under such circumstances that both original master and the intermediate employer are liable for the negligence of the sub-agent, they are all jointly and severally liable. A different rule prevails in Massachusetts and probably in Maine, a master who is not present when his servant commits a wrongful act being held not subject to joint liability even when both are severally liable."

In Cooley on Torts, 142 (1st Ed), the author said:

"The case of carriers of persons is a conspicuous instance in which the failure of a servant to observe due care may constitute a legal wrong to third parties, and render him and his master jointly liable. In undertaking to carry, the carrier assumes the duty to carry safely, so far as the highest vigilance will enable him to do so. A railroad company, acting as such carrier, employs an engineer, whose duty to the company is to run the train with skill and prudence. Now, although there are no contract relations between the engineer and the person who is to be carried, yet, when an individual is placed in a position of responsibility, and the property, and especially the persons of others, are entrusted to his prudence, his skill and fidelity, so that his negligence may inflict serious, and perhaps, irreparable injury, it is reasonable that the law should make it the right of every person thus circumstanced to demand from him a vigilance corresponding to the responsibility. And this, we understand to be the rule. The negligence in such cases is that of both master and servant, and the liability, as in other cases where two or more are chargeable with wrong, may be enforced in a suit against one or both. The *joint* liability would seem to be still plainer where the servant is guilty of a positive act of misfeasance to the property or person being carried. When a train conductor puts a man off the cars without justification, or commits an assault on a passenger in the cars, or runs his train past a station where passengers are to be left, or is guilty of any other misconduct of a like nature, the person injured is under no obligations to look beyond him for redress. Nevertheless, he may, at his option, *unite the railroad* company as a defendant, or sue it separately."

In Wood on Master and Servant (2nd Ed.), Sec. 325, it is said:

"The servant is never liable to third persons for his failure to perform his master's obligations; but for his own wrongful or negligent acts he is liable to third persons injured thereby, either alone *or jointly* with his master. Thus, if a railroad engineer negligently or wilfully runs over cattle on a track or negligently conducts his engine so that the train is thrown from the track, or runs on the time of another train so that a collision results and passengers are injured, he is liable either to the persons injured, or, if his master is compelled to respond in damages therefor, to the master for the damages."

In Estees' Pleading, Vol. 1, Sec. 1834, it is said::

"Master and servant may be joined as defendants in an action to recover for the negligence of the servant."

And in 15 Ency. Pl. & Pr., p. 560, it is said:

"Where a master or principle is liable for the tortious negligence of his servant or agent, it has been held that they may be both sued jointly in an action," citing many authorities.

SUPPOSED CONTRARY DECISIONS.

The opinion in the case of Parsons v. Winchell, 5 Cush. 592, delivered in 1850, and at a time when the common law distinctions in pleading, in that State, were still maintained, seems to furnish the basis for all subsequent decisions, in conflict with the decisions cited by us. In view of the time and circumstances under which that decision was rendered it should not be accepted as authority in cases arising in states not hampered in their decisions by any technical distinction in the forms of pleading, and especially in states, as in Tennessee, where all forms of actions have been abolished, and all redress for civil injuries may be redressed by an action on the facts of the case.

The case of Page v. Parker, 40 N. H. 47, cited by adversary counsel, is not authority for the position contended by them. The effect of that decision is that a principal cannot be jointly sued with his agent when the right of such joinder is based upon "the unauthorized fraudulent acts or representations of the servant or agent, committed or made without the knowledge and concurrence of the master or principal." Such fraudulent acts or representations were beyond the scope of his employment, and, of course, could furnish no basis for a joint action, if indeed the

principal would be liable at all. This decision was also influenced by the forms of action prevailing in that State.

In Bailey v. Bussing, 37 Conn., 349, the Court say they do not see how under the law of that State, and the practice generally, a joint action can be maintained against a master and his servant for the negligence of the servant alone. But the Court expressly refused to pass upon the question, and consequently cannot be considered as authority.

The case of Clark v. Fry, 8 Ohio St., 358, is not in point, and the quotation by adversary counsel is mere *dictum*. The case was brought by Fry against Clark, the owner of certain real estate abutting on a certain street, and Freeman who made an excavation under contract with Clark, extending into said street. The Court specifically held that the relation of master and servant did not exist between Clark and Freeman, and that the excavation was made by Freeman through his own employes, over whom Clark had no control, or direction whatever. Such decision, therefore, cannot be accepted as authority in a case where the relationship of master and servant is unquestioned. The Court said:

"Where the relation of master and servant, or that of principle and agent, exists, there is no difficulty in ascertaining the rule of liability, and the ground upon which it rests, in case of an injury done by the servant or agent in the exercise of his employment. The liability of the master to answer for the conduct of his servant, or that of the principle for the conduct of his agent, is founded on the superintendence and control which the master is supposed to exercise over his servant, or the principle of his agent. * * * * This rule of *respondeat superior*, as its terms import, arises out of the relation of superior and subordinate, is applicable to that relation wherever it exists, whether between principle or agent, or master and servant, and is coextensive with it, and ceases where the relation itself ceases to exist. It is founded on the power of control, and direction which the superior has the right to exercise, and, which, for the safety of other persons, he is bound to exercise

over the act of his subordinates, and in strict analogy to the liability *ex contractu* upon the maxim *qui facit per alium facit per se.* * * *

"Had Clark employed men to work at the building of his house under his own superintendence, control and direction, the workmen would have been bound to follow his direction in reference to every part of the work; he would have been, in fact, master of the persons under his employ, and he would have been undeniably liable for any injury which any third person might have received through the carelessness of any of the workmen in doing the work. But Clark did not so undertake to build his house. He let out by contract the building of the house to Freeman, who undertook to furnish the materials, make excavation, build the walls of the foundation, put up the building, and complete the work, replacing the plank removed from the sidewalk, etc., within a specified time, and in a specified manner, and for a stipulated compensation. There is nothing in the terms of the contract which created the relation of superior and subordinate, by placing Freeman under the superintendence and direction of Clark in the prosecution of the work. By the terms of the contract, Freeman occupied the position of a contractor, selecting and employing his own subordinates, etc., undertaking, upon his own responsibility, to conduct, direct, and control the performance of the work, in conformity with the terms of the contract. Now, in the mode and manner of conducting the work under the contract, and in the selection and employment and directing of the hands, in the performance of the work, the contract clearly does not create the relation of superior and subordinate as between Clark and Freeman, or place the latter under the power and control of the former. When a person is engaged in doing a job or piece of work under an employment or contract which does not create the relation of mere principal and agent, or master and servant, but which leaves to the contractor the free and independent use of his own skill, judgment, means and servants in the execution of it, upon what principle can the employer be made liable for any injury occasioned to a third party by reason of the negligence of the contractor or any of the subordinates? It is clearly not upon the principle of *respondeat superior.*"

The case of Bennett v. Fifield, 13 R. I., 139, was an action of Trespass on the Case, and it was sought to hold Lovell, and the Town of Warwick, as joint tort feasors. The object complained of,

was three flat cars loaded with large iron castings, which Lovell had temporarily left in the highway over which he was moving them to their place of destination. The town was charged with no act, but it was sought to hold it because of the neglect of a statutory duty. The Court said:

"The torts which are imputed to them respectively are distinct. The tort with which Lowell is charged, and for which he was sued, is a tort at common law. The tort with which the town is charged is the neglect of its statutory duty. It would be impossible to declare against them jointly if they were jointly sued, for there was no community of wrongdoing between them."

It will be seen that no question of master and servant was involved in the above case, and that Lovell was sought to be held on the ground of specific acts performed by him, while the town was sought to be held merely because it failed to comply with its statutory duties.

The case of Cole v. Lippitt, 22 R. I., 31, was one brought against Lippitt, owner of the property, Maguire and Penniman, contractors, for a part of the construction of the house, and Robertson, the architect. The deceased was employed by Maguire and Penniman. The negligence charged against Lippitt was the erection of the house upon improper plans, the negligence charged against Robertson was that he caused the erection of the house under improper plans, and the negligence charged against Maguire and Penniman was that they did not use reasonable care in the construction of the building. The Court said:

"These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combine with others to produce the injury. This, however, is not enough to make a joint tort. * * * * A similar statement is made in Sellick

v. Hall, 47 Conn., 260, 274, that it is not enough to make torts joint that the acts constituting them stand in *juxta* position in time and place. *'There must be a oneness of act.'* (Italics ours.) The fact that the effects of several wrongful acts are produced at the same time and place cannot affect the question."

It will be seen that this decision was based upon the theory that in order to hold all as joint tort feasors, the cause of action must grow out of one fact, or transaction, and that you cannot blend several distinct and separate acts of the various defendants in order to hold all as joint tort feasors. This position is not antagonistic to our contention in the present case. There is no blending of several or distinct acts of the defendants, but there is "a oneness of act"—the fact of running the train in violation of statute, and so negligently as to cause the injury complained of.

The opinion in the case of Campbell v. Portland Sugar Co., 62 Me., 552, seems to be based solely upon the holding in Parsons v. Winchell, 5 Cush., 592, which decision we have heretofore shown, was influenced and governed by the forms of pleading, etc., in Massachusetts at that time. It will be observed, however, that the Court holds that both the corporation and its agent are liable, but that they cannot be jointly sued in the same action. How much this opinion may have been influenced by the practice and forms of pleading required in that state, we are unable to say.

In the case of Trowbridge v. Forepough, 14 Minn., 100, it was held that the city and its co-defendants could not be joined in the same action for the reason that under the common law they could not be so joined, and that the statutes in that state did not change the common law on the subject. The entire opinion in the case is as follows:

"The liability of the city depends on a state of facts not affecting its co-defendants; and the converse. Neither is in fact nor

in law chargeable with, or liable on account of, the matter set up as a cause of action against the other. They did not *jointly* conduce to the injury by any acts either of omission or commission.

"Under such circumstances we find no case holding that a *joint* action is maintainable; and we are of the opinion that it is unauthorized by any statute or legal principle. Our statute, which is merely declaratory of the common law, forbids the joinder of cause of action which do not effect all the parties to the action. Gen. St. c. 66, 98. For such improper joinder of causes of action any defendant may demur. There is nothing in the statute, and we discover no reason, requiring all the defendants, to join in such demurrer."

An examination of the decisions cited by counsel for railroad shows that a denial of the right of joinder is predicated upon two grounds:

1. Because of the technical question of pleading involved.

2. Because of the supposed inability to adjust the rights of the parties between themselves after a joint judgment, and that the right of recovery against the master being based upon the doctrine of *respondeat superior,* there is no way of forcing contribution in case of joint judgment.

We call the Court's attention to the fact that the rule that there can be no contribution between joint tort feasors, has no application in cases where the master is held liable for the negligence of the servant under the rule of *respondeat superior.*

Gray v. Boston Co., 114 Mass., 149.
Story on Partnership, Sec. 220.
Betts v. Gibbons, 2 Ad. & El. 57.
Wooley v. Batte, 2 C. & P., 417.
Bailey v. Bussing, 28 Conn., 455.
7 Am. & Eng. Encyl. of Law, pp. 364 and 365-366, and authorities cited.

In Gray v. Boston Co., 114 Mass., 149, the Court said:

"When two parties acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contributions from the other, because both are equally culpable, or *particeps criminis*, and the damage results from their joint offense. The rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damages. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in paridelicto* as to each other, though, as to third persons, either may be liable."

The text in 7 Am. & Eng. Encyl. of Law, pp. 364, 365 and 366 is as follows:

"It is a general and long-established rule that neither contribution nor indemnity will be given to one of several tort feasors against the other.

"But it is to be observed that this rule is only applied to cases of intentional and conscious wrongdoing; if the tortious act was committed without guilty intent, or if the plaintiff, without personal fault, has been exposed to liability because of his responsibility for the acts of the actual wrongdoer, he can recover contribution from those who participated in the act or shared the responsibility, or indemnity from the one with whom rests the actual guilt or the primary responsibility."

The part of the Federal Statute under which removal was had in this case provides as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

It will be observed that when the removal is based upon the allegation of a separable controversy, the *whole suit* goes to the Federal

Court. If the language of the Act left any room for controversy, this question has been definitely settled by this Court.

In Barney v. Latham, 103 U. S., 205, Mr. Justice Harlan said:

"While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that Congress intended to leave any part of a suit in the State court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the Federal Court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which was so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable parties. Rather than split up such a suit between courts of different jurisdiction, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal Court.

"If the clause of the act of 1875, under consideration, is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the act of 1866 which, *ex industria*, limited the removal, in the class of cases therein provided for, to that controversy in the suit, which is distinctively between citizens of different states, and of which there could be a final determination without the presence of the other defendants as parties in the cause."

It thus appears that if the right of the railroad to remove is based upon the theory of its supposed right to be placed in a position that it can have an adjustment with, or contribution from, its negligent servant, then such theory, in its reasoning, must fail, as all the parties are left in the same position in the Federal Court as in the State Court. The whole case is held intact and must

be tried together, and no way is provided by which an adjustment, or contribution can be had between such parties, that did not exist in the State Court. Such contention, therefore, is based upon a theory, which can have no practical operation or effect in this case.

It will be further observed that the removal Statute provides that before the right of removal exists, "there shall be a controversy which is *wholly* between citizens of different states, and which can be fully determined as between them."

This Court has in many cases construed the meaning of the above language, or rather the section in which same appears.

In Geer v. Mathieson Alkali Works, 190 U. S., 428, 432, Mr Justice McKenna said:

"A suit may, consistently with the rules of pleading, embrace several distinct controversies. Barney v. Latham, 103 U. S. 205, 212. It was said in Hyde v. Ruble, 104 U. S. 409: 'To entitle a party to a removal under this clause (second clause of section 2 of the act of 1875, same as second clause in the act of 1877), there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.' In other words, as expressed in Fraser v. Jennison, 106 U. S., 191, 194, 'the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.' And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable. Hyde v. Ruble, *supra*. See also Ayres v. Wiswall, 112 U. S. 187 The application of these principles to the case at bar will be seen by the relief prayed for."

There must exist, therefore, as shown by the pleading, two or more *district controversies,* or "there must exist in the suit a *separate and distinct cause* of action," or the case must be one capable of *separation into parts,"* etc.

In the present case *there is but one controversy, and such controversy grows out of the same transaction, the one fact—the negligent and wrongful operation of the master's train* through which injury resulted, etc.

There is but one cause of action stated, and this cause of action is incapable of being separated into parts.

The theory or grounds upon which liability is placed against each party can make no difference—*the question is, does the liability of all grow out of the same transaction, the same controversy.*

Again, there is no relief sought against the railroad that is distinct, or separable from that sought against its servants. There is no wilfulness or wantonness charged against the servants, entitling the recovery of punitive or exemplary damages, and consequently the relief sought against all is merely for compensatory damages.

Except as to the Warax case, adversary counsel seem content to rely upon a bare citation of other subordinate Federal cases. But we desire to notice some of the cases cited for the purpose of showing they have no application to the facts certified in this case.

The cases of Bryce v. Southern Ry. Co., 122 Fed. Rep., 709, Davenport v. Southern Ry. Co., 124 Fed. Rep., 983, Bryce v. Southern Ry. Co., 125 Fed. Rep., 958, Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 87, and McIntyre v. Southern Ry. Co., 131 Fed. Rep., 985, when rightly understood throw no light upon the controversy in this case.

In Bryce v. So. Ry. Co., 122 Fed. Rep. 709, the Court held that a separable controversy existed because under the Code Civ. Proc. of S. C., where the case originated, the plaintiff must set out in his complaint a plain and concise statement of the facts constituting his cause of action, and it was found as *a fact* that this provision of the Code had not been complied with as to the engineer and conductor, sued jointly with the railroad company, and that the complaint was, therefore, insufficient under the provisions of said Code to state a cause of action against said engineer and conductor, and that a cause of action having been stated only against the railroad, it was entitled to remove the cause.

No such case is presented in the present controversy.

In Davenport v. Ry. Co., 124 Fed. Rep. 983, the action was against the railroad company and certain of its employes to recover for the death of a person, which was alleged to have been caused through the wanton, wilful, reckless and malicious acts of said employes. There was no allegation that the company participated in such acts. The Court on this state of facts held that a separable controversy existed on the theory that in such case the company would only be liable for compensatory damages, while the servants would be liable for punitive or vindicative damages, and that consequently the remedy is different against them, and requiring a different judgment.

In Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 87, the identical question was involved as in the Davenport and McIntyre cases above referred to, as will fully appear from an excerpt from the opinion of Judge Philips (page 96): "By the use of the accumulated epethets that this was done 'carelessly, negligently and recklessly,' the term 'recklessly' thus employed is tantamount

to the allegation that it was 'a wanton disregard of all consequences,' and would warrant the jury in awarding punitive damages against the defendant Hanna, Times Publishing Company v. Carlisle, 94 Fed. 773, 36 C. C. A. 475. Such an allegation in the petition, without more, would warrant the Court in instructing the jury that the plaintiff, if the allegation be sustained by the evidence, would be entitled to exemplary damages as against the defendant Hanna; and this fact, manifest on the face of the petition, presents a separable controversy as to the defendant company under the removal act," citing in support of such holding Davenport v. Southern Ry. Co., 124 Fed. 983.

In the case of McIntyre v. Southern Ry. Co., 131 Fed. Rep. 985, the employes sued with the railroad company were charged with wilfully, wantonly and maliciously causing the injury complained of, and the District Judge followed the decision of Judge Simonton in Davenport v. So. Ry. Co., 124 Fed. Rep. 983.

All the above cases, except Bryce v. So. Ry. Co., 122 Fed. 709, are decided upon the same theory, to-wit., that the charge of wilfulness, wantonness, etc., on the part of the employes created a separable controversy. The District Judge in the McIntyre case said: "The wanton, wilful and malicious acts of the servants charged in the complaint give a separate cause of action against them, and damages may be assessed to the party injured, upon principles altogether different to those allowable against the company itself, for the party may recover punitive damages upon such a cause of action, while the company, although liable in damages for the negligence of its servants, is only liable for compensatory damages, unless it, by its conduct, expressly or impliedly, authorized or approved the wrongful act which the complaint herein nega-

tives." Whether a separable controversy can in any case be predicated upon such a theory is, at least, open to very grave doubt. But be that as it may, no such case is presented here.

In the present case no question of wilfulness, wantonness, maliciousness or recklessness on the part of the servants is involved, and consequently a case decided solely on the theory aforesaid, cannot have any bearing on the present controversy. It will be observed that Judge Simonton delivered the opinions in three of the foregoing cases.

And attention is also called to the fact that, in Davenport v. So. Ry. Co., 135 Fed. Rep. 960, the Circuit Court of Appeals of the Fourth Circuit expressly overruled the case of Davenport v. So. Ry. Co., 124 Fed. Rep. 983, and remanded the cause to the State court. Consequently, the decisions predicated upon such erroneous holding cannot be relied upon as authority.

The much quoted case of Helms v. Northern Pac. Ry. Co., 120 Fed. Rep., 389, was a co-employe case, and Judge Amidon rested his decision on the fact that the deceased being a fellow servant of the engineer and the other servants in charge of the engine whose negligence caused the injury, the railroad would not be liable under the common law for such injury, and that the liability of the company must be predicated upon the Statute of Minnesota, doing away with the fellow servant rule in certain cases, while the liability against the servant is based upon the common law. From this Judge Amidon concludes there is a separable controversy. This decision having been influenced by Statute, everything else said by the Judge, as to what the rule independent of Statute is, was mere *dictum.*

In the present case the right of action against all the defendants must rest upon the same foundation, and upon the same facts.

Enough has appeared, from an analysis of the foregoing cases, to show the inapplicability of most of the cases cited by adversary counsel, to the facts certified in this case.

III.

The right of joinder and the question of separable controversy being so intimately associated, the two questions being generally discussed together in the authorities, we have thought it unnecessary in discussing the questions involved in this controversy to separate the two subjects, and cite the authorities separately sustaining the two propositions, and we rely upon the authorities cited by us as sustaining not only the right of joinder, but also as showing that there exists no separable controversy entitling the railroad company to remove the cause.

Counsel for railroad argue extensively to show that no liability whatever is shown against the individual defendants in this case, and that consequently there can be no joint liability. If this question is presented by the certificate at all, it is only indirectly and because of the legal conclusion that must be drawn from the fact of non-liability on the part of the individual defendants, if the fact be so found.

At a former day of the same term at which this certificate was made, the same Court and consisting of the same Judges, *held* that the negligent acts of an individual defendant, under similar circumstances to those in the present case, constituted actionable negligence against him, and that no separate controversy existed.

American Bridge Co. v. Hunt, 130 Fed. Rep., 302.

From this, as well as from the certificate, it will appear that the Court was not troubled as to whether the individuals were liable at all, but "entertaining grave doubts as to whether a joint right of action was stated against the railroad company and the two individual defendants who were servants of the railroad," instructions are asked, etc., as to whether the parties can "be jointly sued," etc.

That the individual defendants in this case are liable, there can be but little, if any, doubt. The authorities cited by us show liability on the part of the servant beyond question.

Counsel on page 31 of their brief say:

"One of the tests by which to determine whether parties may be sued on a joint tort is whether the same proof would make a case against each. That test fails where the master's liability depends only upon his relation of master; because, to hold the servant liable, it would be necessary only to prove the doing of the act; but in order to make the master liable, it is necessary to prove, in addition, the agency of the servant and that the injurious act was within its scope."

We submit that the true test is not *"whether the same proof would make a case against each."* It is perfectly apparent that in many cases where the right to sue jointly has been maintained, more proof may be required to make the case against some of the defendants than against the others. The mere difference in the *quantum* of proof required has never been held to present a question of the right of joinder, or of separable controversy. The real question in all such cases is whether all the defendants are liable for the acts of wrongdoing or negligence complained of.

The liability of all the defendants in this case arise from the same identical facts, the negligent transaction of the master's busi-

ness. There is but one tort springing from the same set of facts, and there can be but one satisfaction. On principle, and in the very nature of the case, it is most fitting and proper that the action should be joint. In its very nature a tort is a unity. There is but one injury to be redressed, and it makes no difference how complicated the circumstances, nor how numerous the parties may be, nor how varied the relations of the parties, all converge in the one fact of the tort and all parties contributing thereto must answer jointly. It is not necessary that all shall actually participate as *tort feasors* in order to create a joint liability. But the doctrine of joint liability should rest upon the legal right to sue all upon the same facts and for the identical wrong. The question is not one merely of personal wrongdoing, but of legal responsibility for the wrong committed.

When the fact is considered that a corporation must of necessity act through the instrumentality of its agents and servants, and that it alone has the authority to employ such agents and servants, and that third persons have no voice in such selection, then it would seem but reasonable and just that for the negligent and wrongful act of such agent or servant, resulting in injury to a third person, the corporation should not be permitted to so disconnect itself from such agent or servant as to prevent a joinder of both in the same action. The third party is in no way to blame. When a corporation is organized, it is bound to be known that it can only act through its agents and servants, and why should not such corporation, by such act of incorporation and the subsequent employment of agents and servants to transact its business, be held to have so connected and identified itself with such agents and servants that it must answer jointly for the negligence of such agent or servant. Corporations, such as railroads, do not conduct their

business as charitable institutions, but for money-making purposes, and no good reason can be given why they should not be held to strict accountability for the negligence of those whom they employ.

Every foreign railroad company that does business within the limits of a certain state, does so by virtue of the rights, franchises, and privileges granted by such state, and the citizens thereof should have the right to redress any grievance they may have against such corporation in the tribunals of the state, wherein such corporation has, by permission entered, and become subject to its laws. Such aggrieved party should not be put to the inconvenience and expense of taking his witnesses into another jurisdiction, which may be far removed from the place of the wrong committed, such removal being based upon the mere technical question of the supposed right of the railroad to have an adjustment, as between itself and its own negligent servant, as to any liability incurred through the acts of such servant. To establish such rule would not only in many cases work great hardship and inconvenience to the injured party, but might operate as an absolute denial of justice, because of the inability of such party to meet the requirements necessarily devolving upon him under such rule.

We think Question No. 1 should be answered in the affirmative and Question No. 2 in the negative.

Respectfully submitted,

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